IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. THEO SUMMERS BUFFALO BULLTAIL, Defendant.	CR 22-86-BLG-SPW-1 ORDER

Before the Court is Defendant Theo Summers Buffalo Bulltail's Motion to Dismiss Count 1 of the Indictment. (Doc. 76). Buffalo Bulltail argues that, pursuant to Fed. R. Crim. P. 12(b)(1), his indictment for being a prohibited person in possession of a firearm under 18 U.S.C. § 922(g)(1) must be dismissed because the statute unconstitutionally infringes on Buffalo Bulltail's rights under the Second Amendment of the U.S. Constitution, according to *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). (Doc. 77 at 2-3). The Government responds that *Bruen* did not abrogate § 922(g)(1), and that binding Ninth Circuit precedent requires a finding of constitutionality. (Doc. 85 at 2). Further, even if *Bruen* overturned Ninth Circuit precedent, the Government argues that the Second Amendment's text and the nation's historical tradition indicate that § 922(g)(1) is constitutional. (*Id.*).

For the following reasons, the motion is denied.

I. Background

Buffalo Bulltail is charged by indictment with two counts: violation of 18 U.S.C. § 922(g)(1) – Prohibited Person in Possession of a Firearm and Ammunition (Count 1), and violation of 26 U.S.C. § 5961(d) – Possession of an Unregistered Firearm (Count 2). (Doc. 1). Buffalo Bulltail only seeks dismissal of Count 1.

Rule 12(b)(1) of the Federal Rules of Criminal Procedure provides that a party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. A pretrial motion is proper when it involves questions of law rather than fact. *United States v. Shortt Acct. Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986). The Court has determined that Buffalo Bulltail's motion is appropriate for pre-trial resolution because it solely involves a question of law.

II. Analysis

In *Bruen*, the Supreme Court held that the Second Amendment protects an individual's right to carry a handgun for self-defense outside the home, and rejected the means-end scrutiny test that courts of appeals had been applying when assessing the constitutionality of firearms regulations. 142 S. Ct. at 2122, 2127. Instead, the Court held, a court must apply "[t]he test that we set forth in *Heller*"

and "assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id.* at 2131 (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008)). The Government has the burden to demonstrate such consistency. *Id.* at 2126, 2133. The Government does not need to point to an identical statute but only a "representative historical analogue." *Id.* at 2133. Importantly, in a concurring opinion, Justice Kavanaugh, joined by the Chief Justice, agreed with the Court's opinion in full but "underscore[d]" that "the Second Amendment allows a 'variety' of gun regulations," and that nothing in the Court's opinion "'should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill[.]'" *Id.* at 2162 (quoting *Heller*, 554 U.S. at 626). *Accord McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill ….' *Heller*, 554 U.S. at 626-27. We repeat those assurances here.").

Buffalo Bulltail argues that, under *Bruen*, the Government cannot meet its burden of establishing that as of 1791, there was a tradition of prohibiting felons from possessing firearms and ammunition. (Doc. 77 at 7-9). Buffalo Bulltail contends that "the people" that the Second Amendment historically protected

includes "all Americans" and does not provide for categorical exclusions of felons. (*Id.* at 6-7).

The Government disagrees for three reasons: First, *Bruen* expressly held that the Second Amendment protects the right of "law-abiding, responsible citizens"—not all Americans—to carry a handgun for self-defense outside the home. (Doc. 85 at 4 (quoting *Bruen*, 142 S. Ct. at 2156)). Second, *Bruen* did not overrule Ninth Circuit precedent holding that § 922(g)(1) is constitutional because it is not clearly irreconcilable with *Bruen*. (*Id.* at 6-7 (citing *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2011), *cert. denied Vongxay v. United States*, 562 U.S. 921 (2010))). Third, even if *Bruen* overruled *Vongxay*, "representative historical analogues" to § 922(g)(1) existed at the founding, so such laws are rooted in the nation's historical traditions. (*Id.* at 9-12 (quoting *Bruen*, 142 S. Ct. at 2126, 2133)).

On reply, Buffalo Bulltail argues that *Vongxay* is clearly irreconcilable with the reasoning of *Bruen*, so the Court should reject it as binding precedent. (Doc. 86 at 5). Buffalo Bulltail notes that *Vongxay* relied on the holding in *United States v. Younger*, 398 F.3d 1179, 1192 (9th Cir. 2005) that felon dispossession statutes are constitutional, even though *Heller* abrogated *Younger*, only because *Vongxay*'s three-judge panel did not have authority to overrule a previous holding from a three-judge panel and so it was bound to *Younger*'s holding. (*Id.* at 5-6). Since *Heller*—and now *Bruen*—invalidated *Younger*, Buffalo Bulltail argues that

Vongxay is clearly irreconcilable with current Supreme Court law and thus is not binding on this Court. (*Id.* at 6).

This Court and two others in this district have concluded that *Bruen* did not effectively overrule *Vongxay* because *Vongxay* is not "clearly irreconcilable with the reasoning or theory of intervening higher authority," namely *Bruen*. *United States v. Butts*, CR 22-33-M-DWM, __ F. Supp. 3d __, 2022 WL 16553037, at *3-4 (D. Mont. Oct. 31, 2022); *United States v. Boyd*, CR-20-121-DLC-1, at 6 (D. Mont. Jan. 25, 2023); *United States v. Stennerson*, CR 22-139-BLG-SPW, 2023 WL 2214351, at *2 (D. Mont. Feb. 24, 2023). As explained by this Court in *Stennerson*, Judge Molloy in *Butts*, and Judge Christensen in *Boyd*, *Vongxay* did not apply the means-ends scrutiny rejected by *Bruen*. Rather, *Vongxay* applied *Heller*'s determination that § 922(g)(1) was constitutional because it was consistent with longstanding limitations on gun possession and because "the right to bear arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals) …" *Vongxay*, 594 F.3d at 1118 (citing Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs. 143, 146 (1986)). Since *Vongxay*'s holding relied only on good law from *Heller*, it is not clearly irreconcilable with *Bruen* and is controlling on this Court.

Buffalo Bulltail argues that *Butts* was incorrectly decided because *Heller* did not address specifically whether § 922(g)(1) was constitutional. (*Id.* at 6).[1] However, the fact that *Heller* did not specifically comment on the constitutionality of § 922(g)(1) here is immaterial because *Heller* and Kavanaugh's concurrence in *Bruen* specifically commented on the constitutionality of the statute's subject— the prohibition on felons possessing firearms. *Bruen*, 142 S. Ct. at 2162, 2157; *Heller*, 554 U.S. at 626, 636. Both said felon dispossession laws are valid, thus implying that *the* federal felon dispossession law, § 922(g)(1), must be valid. The plain reading of the cases suggests no other conclusion.

With respect to Buffalo Bulltail's argument that *Vongxay*'s reliance on *Younger*—which *Heller* abrogated—invalidates *Vongxay*'s holding, Buffalo Bulltail ignores that *Vongxay* repeatedly stated that *Heller* provides an independent basis for the court's conclusion that § 922(g)(1) is presumptively lawful. 594 F.3d at 1114-15. *Vongxay* also clarifies that *Heller* did not abrogate *Younger*'s conclusion that felon dispossession laws are "presumptively lawful." *Id.* at 1116. ("Although our legal inquiry ends with *Younger* [as precedent until overturned by an en banc panel], our holding is buttressed by the fact that *Younger* upheld the very type of gun possession restriction that the Supreme Court deemed

[1] Bulltail does not address *Stennerson* or *Boyd* despite the Government's discussion of them in its response brief. (Doc. 85 at 2, 8).

'presumptively lawful' in *Heller*.")). Rather, *Heller* only abrogated *Younger*'s reasoning that § 922(g)(1) is unlawful because the Second Amendment does not confer on individuals a right to bear arms. *Id.* Thus, the Court declines to depart from this Court's and this district's consistent finding that *Vongxay* is precedential and requires a finding that § 922(g)(1) is constitutional.

Buffalo Bulltail also argues that *Heller* and *Bruen* extend the right to bear arms to "all Americans," thus prohibiting the exclusion of subsets of citizens, in this case felons. (*Id.* at 2-3). However, Buffalo Bulltail's argument that *Heller* and *Bruen* require an expansive reading of "the people" who receive protection under the Second Amendment ignores the plain text of the cases. As *Butts* explains:

> In *Bruen*, the majority opinion states that its holding was "in keeping with *Heller*." 142 S. Ct. at 2126. Consistently, *Bruen* repeatedly uses the term "law-abiding citizen" in reference to an individual's Second Amendment rights. *See, e.g.*, *id.* at 2122 (*Heller* and *McDonald* "recognized that the Second and Fourteenth Amendments protect the right of an ordinary, *law-abiding citizen* to possess a handgun in the home for self-defense"); *see id.* (concluding that right extends outside the home for "ordinary, *law-abiding citizens*"); *id.* at 2133 (instructing courts to consider "how and why the regulations burden a *law-abiding citizen's* right to armed self-defense"); *id.* at 2134 (describing petitioners are "two ordinary, *law-abiding*, adult citizens"); *id.* at 2138 (noting that there is no historical traditional [sic] "limiting public carry to those *law-abiding citizens* who demonstrate a special need for self-defense"); *id.* at 2150 (historical analogues advanced by New York fail because "none operated to prevent *law-abiding citizens* with ordinary self-defense needs from carrying arms in public for that purpose"); *id.* at 2156 (no historical record requiring "*law-abiding, responsible citizens*" to demonstrate a need to obtain a license to carry); *id.* (New York law violates the Second Amendment because it "prevents *law-abiding citizens* with ordinary self-defense needs from exercising their right to keep and bear arms"). The concurring opinions of both Justices Alito and Kavanaugh

> further affirm that *Bruen* did not disturb what was said in *Heller* about the restrictions imposed on possessing firearms. *Id.* at 2162 (Kavanaugh, J., concurring); *id.* at 2157 (Alito, J., concurring).

2022 WL 16553037, at *3 (emphasis in original).

Nor is *Bruen*'s and *Heller*'s "law abiding citizen" language dicta. "The Ninth Circuit has specifically determined that *Heller*'s language regarding lawful long-standing gun restrictions on felons is not nonbinding dicta: 'Courts often limit the scope of their holdings, and such limitations are integral to those holdings.' The same holds true for *Bruen*'s use of the 'law-abiding citizen' proviso." *Id.* (quoting *Vongxay*, 594 F.3d at 1115).

Buffalo Bulltail attempts to narrow *Bruen*'s application to cases in which law-abiding citizens seek to possess guns, but his argument is unavailing. (*See* Doc. 86 at 3). Buffalo Bulltail cites to Justice Samuel Alito's concurrence to suggest that *Bruen* left open the question of the constitutionality of felon dispossession statues, quoting, "Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun." (*Id.* (quoting *Bruen*, 142 S. Ct. at 2157)). What Justice Alito writes after that, which Buffalo Bulltail omits, dismantles Buffalo Bulltail's argument: "Nor have we disturbed anything that we said in *Heller* or *McDonald* … about restrictions that may be imposed on the possession or carrying of guns." *Bruen*, 142 S. Ct. at 2157.

As the Court has stated, *Heller* and *McDonald* both held that felon dispossession statutes are presumptively lawful, and *Bruen* did not disturb those holdings.

Accordingly, the Court finds that § 922(g) is constitutional and denies Buffalo Bulltail's motion.

III. Conclusion

IT IS HEREBY ORDERED that Defendant Theo Summers Buffalo Bulltail's motion (Doc. 76) is DENIED.

DATED this 12th day of June, 2023.

Susan P. Watters

SUSAN P. WATTERS
United States District Judge